

STATE OF MICHIGAN  
IN THE SUPREME COURT

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APPEAL FROM THE COURT OF APPEALS

Jansen, C.J., and Meter and Cooper, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,	)	SUPREME COURT FILE
	)	NO. 127194
Plaintiff-Appellant,	)	
	)	COURT OF APPEALS FILE
vs	)	NO. 245012
	)	
JOHN ALBERT GILLIS	)	ST. CLAIR COUNTY
	)	NO. A 02-601-FC
Defendant-Appellee,	)	
	)	

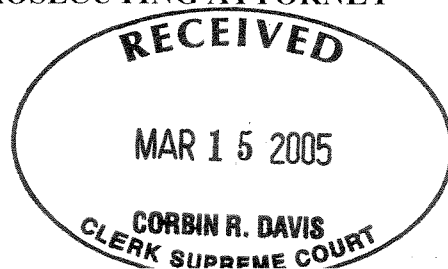
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THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN  
Amicus Curiae Brief  
IN SUPPORT OF PLAINTIFF-APPELLANT  
THE PEOPLE OF THE STATE OF MICHIGAN

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## **STATEMENT OF APPELLATE JURISDICTION**

Jurisdiction for the Supreme Court to hear this appeal is conferred by MCL 770.3(6), 770.12; MCR 7.301(A)(2) and MCR 7.302(G)(3). Plaintiff-Appellant ("Plaintiff") appealed from the unpublished Court of Appeals' decision, People v Gillis, Docket # 245012, which was decided August 17, 2004.

The Supreme Court granted leave on January 21, 2005. The parties were directed to include among the issues briefed: “(1) whether the plain language of MCL 750.316 permits a conviction for first-degree murder “in the perpetration of” a first or second-degree home invasion where the homicide occurs several miles away from the dwelling and several minutes after the defendant has left the dwelling; and (2) whether, under the separation of powers doctrine, the Court of Appeals had the authority to direct the circuit court, on remand, to limit the charges on retrial to those that the Court of Appeals determined should have “properly” been brought.” (Order, entered January 21, 2005.)

The Court invited the filing of briefs amicus curiae from the State Appellate Defender, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan.



## **STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

The Prosecuting Attorneys Association of Michigan, Amicus Curiae, joins in the Statement of Material Proceedings and Facts of the Plaintiff-Appellant, People of the State of Michigan.

## **STATEMENT OF QUESTIONS INVOLVED**

### **I**

**THE PLAIN LANGUAGE OF MCL 750.316(1)(b) PERMITS CONVICTIONS FOR FIRST-DEGREE MURDER “IN THE PERPETRATION OF” (“OR ATTEMPT TO PERPETRATE”) FIRST-DEGREE HOME INVASION. WHEN VEHICULAR HOMICIDES OCCUR SEVERAL MILES FROM A HOME INVASION, AND JUST MINUTES AFTER DEFENDANT FLED FROM THAT DWELLING, SHOULD THE JURY BE ALLOWED TO CONSIDER THE CAUSUAL CONNECTION BETWEEN THE HOME INVASION, DEFENDANT’S INTENTIONAL EFFORTS TO AVOID APPREHENSION, AND THE DEATHS, WHEN DECIDING WHETHER DEFENDANT IS GUILTY OF FIRST-DEGREE MURDER?**

Amicus Curiae Answers: “Yes”

### **II**

**THE EXECUTIVE BRANCH OF THE GOVERNMENT FILES CRIMINAL CHARGES AGAINST DEFENDANTS, AND THE JUDICIAL BRANCH REVIEWS THESE CHARGING DECISIONS TO DETERMINE IF THEY ARE UNCONSTITUTIONAL, ILLEGAL OR ULTRA VIRES. IN DEFENDANT’S FIRST-DEGREE MURDER CASE, THE COURT OF APPEALS FOUND HIS FIRST-DEGREE HOME INVASION CRIME WAS UNCONNECTED TO TWO VEHICULAR DEATHS. THIS CONCLUSION OF LAW WAS NOT BASED ON THE EXECUTIVE BRANCH’S UNCONSTITUTIONAL, ILLEGAL OR ULTRA VIRES ACTIONS. SHOULD THE COURT’S DECISION BE REVERSED, BECAUSE IT VIOLATED THE SEPARATION OF POWERS CLAUSE OF MICHIGAN’S CONSTITUTION?**

Amicus Curiae Answers: "Yes"

## ARGUMENT I

**THE PLAIN LANGUAGE OF MCL 750.316 PERMITS CONVICTIONS FOR FIRST-DEGREE MURDER “IN THE PERPETRATION OF” FIRST-DEGREE HOME INVASION. IN DECIDING WHETHER DEFENDANT IS GUILTY OF FIRST-DEGREE MURDER (SUPPORTED BY A FELONY MURDER THEORY), THE JURY CONSIDERS THE CONNECTIONS BETWEEN THE HOME INVASION, DEFENDANT’S INTENTIONAL EFFORTS TO AVOID APPREHENSION, AND THE DEATHS, WHEN VEHICULAR HOMICIDES OCCUR SEVERAL MILES FROM THE HOME AND JUST MINUTES AFTER DEFENDANT FLED FROM IT.**

This Court now considers the plain language of MCL 750.316(1):

“A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:” ....

.....(b) “*Murder committed in the perpetration of, or attempt to perpetrate...home invasion in the first degree...*” (Emphasis supplied)

The Court must decide whether the statutory language permits a First-Degree Murder conviction based on a First-Degree Home Invasion crime, where two deaths occurred several miles from the home and a few minutes after defendant left the dwelling. The Court must decide whether these vehicular deaths were the result of acts committed “*in the perpetration of, or attempt to perpetrate*” of First-Degree Home Invasion. The Court will also decide whether a trial judge may determine that, as a matter of law, a murder was committed during the perpetration of a specified felony, or not.

## STANDARDS OF REVIEW

Statutory construction is a question of law subject to de novo review.<sup>1</sup> The primary goal of statutory interpretation is to effectuate the Legislature's intent.<sup>2</sup> The Court examines the language of the statute and, if unambiguous on its face, the Court concludes the Legislature

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<sup>1</sup> County of Wayne v Hathcock, 471 Mich 445, 455; 684 NW2d 765 (2004).

<sup>2</sup> Kreiner v Fischer, 471 Mich 109, 139; 683 NW2d 611 (2004), Cavanagh, J., dissenting.

intended the meaning expressed. No further judicial construction is required or permissible.<sup>3</sup>

No preliminary examination was held in Defendant's case. However, Defendant's motion to quash the Felony Murder charges was denied by the trial court, after an evidentiary hearing. Defendant argued the evidence was legally insufficient to support the charges as a matter of law (insufficient nexus between the murders and the home invasion due to lapse of time and distance). This Court must determine whether the circuit court properly applied the law to the facts, when denying Defendant's motion to quash. Application of the law is reviewed de novo.<sup>4</sup> Similarly, the questions of statutory construction are reviewed de novo.<sup>5</sup>

### **DEFINING "PERPETRATION"**

Michigan case law already explains how the word "perpetration" is defined in the First-Degree Murder statute. In People v Bowen,<sup>6</sup> the Court of Appeals interpreted the word "perpetrate" as it was used in an earlier version of Michigan's First-Degree Murder statute. Relying on Webster's 3<sup>rd</sup> New International Dictionary, the Court concluded "perpetrate" meant "to be guilty of (as a crime, an offense)" or "to carry through."<sup>7</sup> The Court reasoned that defendant Bowen's robbery was not completed because his escape had not yet occurred. An offender's escape from the scene of the crime was a part of the predicate felony for the Felony Murder portion of the First-Degree Murder statute. Offenders contemplate an escape as a part of the crime, and resistance from citizens or police officers can be expected. By interpreting the language of the statute (and considering the Felony Murder rule), the Court concluded defendant Bowen was lawfully convicted of First-Degree Murder when his accomplice shot and killed a

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<sup>3</sup> Id.

<sup>4</sup> People v Thousand, 465 Mich 149,156; 631 NW2d 694 (2001).

<sup>5</sup> Id. at 164-165.

<sup>6</sup> 12 Mich App 438, 440; 162 NW2d 911 (1968).

<sup>7</sup> Id. Another modern interpretation of "perpetrate" means: "to carry out; enact; commit: *to perpetrate a hoax.*" Webster's Universal College Dictionary, (2001).

police officer as they tried to escape from the bank robbery.

The Bowen opinion relied on People v Podolski.<sup>8</sup> In Podolski, this Court ruled that a homicide committed immediately after a robbery "apparently for the purpose of preventing detection" comes within the felony-murder rule.<sup>9</sup> The Podolski opinion quoted favorably from Wharton, *Law of Homicide* (3d ed), p 186, explaining that a robber's escape is an aspect of the *res gestae* of a felony. It was not necessary that the homicide be committed "at the precise time and place" of the robbery. Escape is normally within the *res gestae* of a felony and, therefore, a killing that occurs during flight or escape falls within the parameters of Michigan's felony murder statute.

The Bowen and Podolski cases were important in later cases. In People v Goree,<sup>10</sup> the Court affirmed a First-Degree Murder conviction where defendant committed an armed robbery of a food market, drove away in a car, and an arresting police officer was killed during the defendant's apprehension. The Court found the robbery was still being "perpetrated" when the officer was shot. In People v Oliver,<sup>11</sup> the Court affirmed a Felony Murder conviction where defendant shot and killed a state trooper a few miles away from the bank and within a half hour after the crime.<sup>12</sup> The Court found it "incredible" that defendant claimed he had reached a point of "temporary safety" so as to have completed the armed robbery. The Oliver case cited Podolski, emphasizing that a homicide committed *immediately* after a robbery, for the purpose of *preventing detection*, is felony murder.<sup>13</sup>

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<sup>8</sup> 332 Mich 508; 52 NW2d 201 (1952).

<sup>9</sup> 332 Mich at 518.

<sup>10</sup> 30 Mich App 490; 186 NW2d 872 (1971)

<sup>11</sup> 63 Mich App 509; 234 NW2d 679 (1975)

<sup>12</sup> 63 Mich App at 523.

<sup>13</sup> *Id.*

In People v Gimotty,<sup>14</sup> the Court considered the current statute, MCL 750.316(1)(b). The Court affirmed defendant's felony murder conviction, where he sped away from a store and, after a high speed chase, struck another car. The car crash injured the other driver and killed a child passenger. Again, the Court concluded that defendant Gimotty had not reached "a place of temporary safety" so as to end the "perpetration" of the retail fraud felony. He was properly charged and convicted of felony murder.<sup>15</sup> The death of the child was sufficiently connected to the underlying felony.

Based on these modern cases, Michigan's First-Degree Murder statute has *already* been interpreted to include murders occurring during the "perpetration" (including escape) of specified felonies.<sup>16</sup> This Court should adopt the interpretation of the word "perpetrate" that was used in the Bowen, Oliver, Gimotty, and Podolski cases. Measures taken by fleeing felons, designed to escape crime scenes and avoid apprehension, are logically related to their underlying felonies.<sup>17</sup>

Taking the historical view: Michigan's earliest First-Degree Murder statutes included

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<sup>14</sup> 216 Mich App 254; 549 NW2d 39 (1996), lv den 454 Mich 875; 560 NW2d 638 (1997).

<sup>15</sup> Id. at 258, 259.

<sup>16</sup> In Michigan, "murder committed while attempting to escape from the scene of a felony is felony murder if it is immediately connected with the underlying felony." Terry v Bock, 208 F Supp 2d 780, 795 (ED Mich, 2002), aff'd in 79 Fed Appx 128 (2003) See also: Anno: What Constitutes Termination of Felony for Purpose of Felony-Murder Rule, 58 ALR 3d 851.

<sup>17</sup> A recent case, People v Randolph, 466 Mich 532; 648 NW2d 164 (2002), also discussed concepts of "escape," "res gestae," "transactional approach," and "place of temporary safety," when interpreting the Unarmed Robbery statute, MCL 750.530. Explicit language of that statute did not, however, harmonize with these judicial concepts. In Randolph, the Court overruled them, as applied to the Unarmed Robbery statute. A *different* result occurs in the instant case, because the language of the First-Degree Felony Murder statute is uniquely tailored to include these concepts. The Felony Murder statute rests on an interpretation of the words: "Murder committed in the perpetration of, or attempt to perpetrate,....home invasion in the first degree..." MCL 750.316(1).

language identical to that used in the current statute. In 1858 in People v Potter,<sup>18</sup> the Court explained the origin of the statute and its requirement that “all murder...committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree...” That language was carried forward, in How. Stat. chap. 317, as quoted in People v Hull.<sup>19</sup> In 1895, the Court referred to Section 9075, How. Stat., which also identified all murders committed in the perpetration or attempted perpetration of a specified felonies as First-Degree Murder.<sup>20</sup> Finally, in People v Utter,<sup>21</sup> the Court quoted from Mich. Comp. Laws tit. 3, § 15192 (1915). That statute appears to be an early version of the current Michigan statute defining when felony murder is elevated to First-Degree Murder. It carried forward the identical language about the perpetration of specified felonies.

In the case at bar, the trial court properly denied Defendant’s motion to quash the First-Degree Felony Murder charges. To establish those charges, the prosecutor proved: (1) the killing of two human beings, (2) *with intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result*, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony under the felony murder statute, MCL 750.316(1)(b).<sup>22</sup> First Degree Home Invasion is one of the enumerated felonies. A reasonable jury could infer Defendant’s flight from the Albright home was an attempt to avoid apprehension for the home invasion.

One can logically assume Defendant planned his Home Invasion crime *and his escape*. He knew he would be driving away from the Albright dwelling. His escape was not any less a

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<sup>18</sup> 5 Mich 1 (1858).

<sup>19</sup> 86 Mich 449, 457; 49 NW 288 (1891).

<sup>20</sup> People v Repke, 103 Mich 459, 466; 61 NW 861 (1895).

<sup>21</sup> 217 Mich 74, 86; 185 NW 830 (1921).

<sup>22</sup> People v Nowack, 462 Mich 392, 401; 614 NW2d 78 (2000); People v McCrady, 244 Mich App 27, 30-31; 624 NW2d 761 (2000).

part of his crime. His extraordinary driving tactics demonstrated his sincere determination not to be apprehended. Although he did not get any loot from the Albright's, he certainly feared being caught. When he perceived he was being followed by the police, Defendant renewed his determination to flee. Accordingly, viewed in a light most favorable to the prosecution, there was sufficient evidence to submit the First-Degree Felony Murder charges to the jury.

Evidence of flight is routinely relevant and admissible.<sup>23</sup> The term "flight" includes fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.<sup>24</sup> This evidence is probative because it may indicate consciousness of guilt. A "defendant's flight becomes part of a seamless web of evidence that a rational trier of fact could employ to find the elements of the crime proven beyond a reasonable doubt."<sup>25</sup> Therefore, Defendant's flight was both relevant and admissible to demonstrate consciousness of guilt.

#### **THE JURY DECIDES IF A MURDER OCCURRED DURING "PERPETRATION" OF THE HOME INVASION**

The Court of Appeals in the instant case found there was no "causal relationship" between the murders and the underlying Home Invasion. Because "the home invasion and death of the Ackermans were not connected in time, place or causal relationship," the Court vacated Defendant's Felony Murder convictions and sent the case back to the trial court for retrial on Fleeing & Eluding and Second Degree Murder. [Slip Opinion, p 4] These factual determinations about the murders were clearly erroneous; furthermore, the Court misapplied the law about felony murder too.

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<sup>23</sup> People v Cammarata, 257 Mich 60, 66; 240 NW 14 (1932); People v Coleman, 210 Mich App 1, 4; 532 NW2d 885 (1995)

<sup>24</sup> Coleman, *supra* at 4.

<sup>25</sup> People v Cutchall, 200 Mich App 396, 401; 504 NW2d 666 (1993), overruled on other grounds by People v Edgett, 220 Mich App 686; 560 NW2d 360 (1996).



The trial court permitted the jury to evaluate the circumstances of the predicate crime and the murders. That was the appropriate thing to do. The prosecution presented sufficient evidence to establish First-Degree Home Invasion, and showed Defendant's immediate efforts to flee from the crime scene and evade the police. Evidence revealed Defendant reacted dramatically when he believed he might be apprehended. He led the state troopers on an I-94 and I-69 car chase that endangered him, the troopers, and many others on the roads. The car crash that ended the event was immediately connected with the Home Invasion.

The Court of Appeals did not consider the modern case law already interpreting the word "perpetration" in the felony-murder portion of the First-Degree Murder statute. Bowen, Oliver, Gimotty, and Podolski, *supra*. The Court did not consider the statutory guarantee that a jury decides the degree of the murders, not the Court.<sup>26</sup>

When considering the felony-murder doctrine in People v Aaron, this Court concluded the doctrine unfairly punished homicides without "the necessity of proving the relation between the homicide" and a defendant's state of mind.<sup>27</sup> To remedy these concerns, the Court ruled that proof must be presented that a defendant acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior will cause death or great bodily harm.<sup>28</sup> The Court held *the issue of malice must always be submitted to the jury*.<sup>29</sup> The jury decides if the facts and circumstances involved in the underlying felony reveal the requisite malice when the murder was committed.<sup>30</sup>

The Court's conclusion, that the jury decides the issue of malice, is an accurate one. A

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<sup>26</sup> MCL 768.32.

<sup>27</sup> 409 Mich 672,708; 299 NW2d 304 (1980).

<sup>28</sup> Id. at 733.

<sup>29</sup> Id.

<sup>30</sup> Id. at 729-733.

defendant is guaranteed the right to place the issue of malice and the degrees of murder before the jury. Those guarantees surfaced in early Michigan Constitutions, statutes, and case law. In People v Repke, for example, the Court agreed that the Michigan Constitution, and a 1857 statute, guaranteed that the jury would decide the degree of the murder.<sup>31</sup> Today, MCL 750.318 guarantees that the degree of murder is decided by the jury. The pertinent part of that statute reads:

The jury before whom any person indicted for murder shall be tried *shall*, if they find such person guilty thereof, ascertain in their verdict, *whether it be murder of the first or second degree*; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. (Emphasis supplied)

A jury must determine if there is a causal connection between the predicate felony and a victim's death.<sup>32</sup> Inculpatory inferences can be drawn from the evidence that a defendant killed a victim to prevent detection of the criminal act, and that the killing was 'immediately connected' with the crime.<sup>33</sup> Even if some time elapses between the underlying felony and the murder, a jury may conclude a defendant's actions were a continuous transaction that resulted in death.<sup>34</sup>

As Aaron held, the issue of malice is a jury issue. And malice is not a simple concept. "'Malice aforethought' means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but 'malice aforethought' does not necessarily imply any ill will, spite or hatred

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<sup>31</sup> People v Repke, 103 Mich at 467.

<sup>32</sup> See People v Datema, 448 Mich 585, 601; 533 NW2d 272 (1995) and People v Lardie, 452 Mich 231, 263-264; 551 NW2d 656 (1996). See also: People v Walsh, 262 NY 140; 186 NE 422 (1933), overruled on other grounds in People v Rosario, 9 NY2d 286; 173 NE 881 (1961) and People v Johnson, 5 Cal App 4th 552; 7 Cal Rptr 2d 23 (1992).

<sup>33</sup> People v Thew, 201 Mich App 78, 87-88; 506 NW2d 547 (1993).

<sup>34</sup> Id.

towards the individual killed.”<sup>35</sup> Malice is not to be confused with “specific intent.”<sup>36</sup> The Aaron decision did not preclude a jury *inferring* malice under appropriate circumstances.<sup>37</sup>

A jury can properly *infer* malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm.<sup>38</sup> This Court has held that a defendant can be said to act in wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or serious bodily injury where he operates an automobile during a police chase at a grossly excessive speed after dark while disregarding traffic signals on a main traffic artery.<sup>39</sup> Intent is a question of fact to be inferred from the circumstances by the trier of fact.<sup>40</sup> Consequently, “whenever a killing occurs in the perpetration or attempted perpetration of a felony, in order to establish malice the jury may consider the nature of the underlying felony and the circumstances surrounding its commission.”<sup>41</sup> If the jury concludes that malice existed, it may find murder. If the jury determines that a murder occurred in the perpetration, or attempted perpetration, of one of the felonies listed in the statute, the murder is elevated to First-Degree Murder.

The Felony-Murder statute protects the important relationship between a defendant’s culpability and criminal liability.<sup>42</sup> Defendant’s case did not violate the concepts set forth in the Aaron case. The jury considered the causal relationship between the Home Invasion and the

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<sup>35</sup> People v Morrin, 31 Mich App 301, 311; 187 NW2d 434 (1971), quoting from 1 Devitt & Blackmar, Federal Jury Practice and Instructions (2d ed), § 43.05, p 538.

<sup>36</sup> People v Nowack, 462 Mich at 409-410.

<sup>37</sup> 409 Mich at 729-730.

<sup>38</sup> Id., citing: Guilty Plea Cases, 395 Mich 96, 131; 235 NW2d 132 (1975); People v Haack, 396 Mich 367, 375; 240 NW2d 704 (1976).

<sup>39</sup> People v Vasquez, 129 Mich App 691, 694; 341 NW2d 873 (1983).

<sup>40</sup> People v Turner, 213 Mich App 558; 540 NW2d 728 (1995), overruled on other grounds in People v Mass, 464 Mich 615; 628 NW2d 540 (2001).

<sup>41</sup> Id., citing: People v Pavlic, 227 Mich 562; 199 NW 373 (1924) and People v Fountain, 71 Mich App 491, 506; 248 NW2d 589 (1976).

<sup>42</sup> 409 Mich at 712-714.

deaths. In Defendant's case, these homicides were murders. His malicious intent was clearly demonstrated by his actions. All things considered, Defendant's First-Degree Murder convictions should be reinstated.

### **FELONY MURDER: HOW MCL 750.316(1)(b) APPLIES TO SPECIFIED FELONIES**

Michigan courts do not recognize common-law Felony Murder anymore. That traditional doctrine was abolished in 1980 in People v Aaron.<sup>43</sup> However, the state's First-Degree Murder statute currently includes a category of First-Degree Murder that is commonly referred to as "Felony Murder." MCL 750.316(1)(b).<sup>44</sup> The First-Degree Murder statute is unique, in that it is a "degree-raising device."<sup>45</sup> It "serves to raise an already established *murder* to the first-degree level, not to transform a death, without more, into a murder."<sup>46</sup>

Defendants perpetrating, or attempting to perpetrate, specified felonies may be subject to a First-Degree Murder conviction. In Aaron, this Court held that felony murder could not be made out simply by proof that a homicide occurred in the course of an enumerated felony. Thus, the prosecution must present not only evidence of defendant's participation in a felony, but also evidence of a murder, that is, evidence of malice in that defendant either intended to kill or to do great bodily harm, or wantonly and wilfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm.

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<sup>43</sup> 409 Mich at 730-734; People v Holtschlag, 471 Mich 1, 9; 684 NW2d 730 (2004); Dressler, *Understanding Criminal Law* (3rd ed), § 31.06[A], p 515.

<sup>44</sup> MCL 750.316(1)(b) provides: "A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life: ..... (b) *Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping.*" (Emphasis supplied)

<sup>45</sup> People v Aaron, 409 Mich at 719-720.

<sup>46</sup> Id., at 719.

In brief summary, the elements of *statutory* Felony Murder are:

- (1) Killing of a human being.
- (2) With intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice].
- (3) Committed in the perpetration of, or attempt to perpetrate, any of the felonies specifically enumerated in the statute.<sup>47</sup>

Statutory Felony Murder is a Second-Degree Murder committed during the course of one of the specified felonies.<sup>48</sup> This Court determined that the statute did *not* codify the common-law felony-murder rule into Michigan jurisprudence.<sup>49</sup>

The Felony Murder statute, MCL 750.316(1)(b), separates Michigan from common-law “felony murder” states. In other states, a prosecutor need not prove a culpable mental state with respect to the murder, because the intent to kill is conclusively presumed if an intent to commit the underlying felony is proven.<sup>50</sup> The common-law felony-murder rule implied intent or implied malice aforethought.<sup>51</sup> As explained in Aaron, the common-law felony-murder doctrine was significantly restricted by some courts, to prevent unfair applications.<sup>52</sup> The doctrine was considered fundamentally unfair and in violation of basic principles of criminal culpability, by holding a defendant liable for the unforeseen and unagreed-to results of a felony not in itself directly or naturally dangerous to life.<sup>53</sup> Application of the felony-murder doctrine was unjust in cases where the death was purely accidental. Based on the perceived harshness and inequity of

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<sup>47</sup> People v Nowack, 462 Mich 392, 401; 614 NW2d 78 (2000).

<sup>48</sup> People v Carter, 395 Mich 434, 437; 236 NW2d 500 (1975).

<sup>49</sup> People v Aaron, 409 Mich at 721.

<sup>50</sup> Hopkins v Reeves, 524 US 88, 91-92; 118 S Ct 1895, 1989; 141 L Ed 2d 76 (1998).

<sup>51</sup> People v Morrin, 31 Mich App at 311.

<sup>52</sup> People v Aaron, 409 Mich at 723-725.

<sup>53</sup> Id. at 731; Dressler, supra, § 31.06[B], p 516

the doctrine, this Court abrogated the doctrine.<sup>54</sup>

According to Aaron, Michigan's Felony Murder statute requires a "murder" be established *first* before the statute applies to elevate the degree of murder. Felony Murder also requires "malice". Malice may not be inferred from the intent to commit the underlying felony alone.<sup>55</sup> But a jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.

### **HOME INVASION AS A PREDICATE FELONY**

In 1994, the Legislature completely re-wrote the First Degree Murder statute.<sup>56</sup> In 1996, the Legislature amended the First-Degree Murder statute about predicate felonies for Felony Murder. The amended statute included two new predicate felonies: Home Invasion First and Second Degree. By revising the First-Degree Murder statute, the Legislature significantly expanded the felonies serving as predicates to elevate a second-degree murder to first-degree. This expansion is noteworthy. It signals an emerging desire to enhance penalties for offenders who commit murder during perpetration of their crimes. There are many plausible reasons for the Legislature's activism: (1) more offenders are using lethal force to complete their felonious acts (violent escape efforts), (2) lethal weapons are increasingly available to those choosing to use them, and (3) victims of violent crimes gained higher status in the criminal justice system, due to a Constitutional amendment, and they are demanding greater accountability for those

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<sup>54</sup> 409 Mich at 733.

<sup>55</sup> 409 Mich at 730-734.

<sup>56</sup> Before the 1994 amendment, MCL 750.316 provided: "Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life."

committing deadly acts.<sup>57</sup>

Courts understand the Legislature's purposeful changes to the statute. In People v Warren,<sup>58</sup> the Court found that defendant's conviction for First-Degree Felony Murder could be supported by the underlying felony of Home Invasion even though it was not an enumerated felony at the time of the defendant's conviction.<sup>59</sup> Because Home Invasion replaced the offense of breaking and entering a dwelling with the intent to commit a felony or larceny therein, the Court found it sufficient to use the enumerated conduct to form the basis of a First-Degree Murder conviction.<sup>60</sup>

#### **OTHER PREDICATE FELONIES INVOLVE INDEFINITE PERIODS OF "PERPETRATION"**

Although Aaron abolished the common-law felony murder rule and emphasized that the First-Degree Murder statute did *not* codify that rule into Michigan jurisprudence, the Legislature continues to add new predicate felonies to the list of those felonies that are elevated to First-Degree Murder. It is ironic that the Court has actively stomped out a doctrine that the Legislature seems determined to cultivate and EXPAND.

Since 1994, the Legislature added to the number of felonies serving as predicates. Some of the "new" predicate felonies involve a course of conduct or several criminal acts to "perpetrate" them. These felonies differ from each other and create difficulty in establishing a "bright-line rule" about when a crime is "perpetrated". For example, the crime of child abuse in the first degree<sup>61</sup> often requires proof of a series of acts that inflicted serious physical or mental

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<sup>57</sup> Const 1963, art I, § 24.

<sup>58</sup> 228 Mich App 336; 578 NW2d 692 (1998), *aff'd* in part and *rev'd* in part, 462 Mich 415; 615 NW2d 691 (2000).

<sup>59</sup> *Id.* at 346 n 3, 349. Home Invasion was not added as a predicate felony until April 1, 1996.

<sup>60</sup> *Id.* at 352.

<sup>61</sup> MCL 750.136b(2).

harm on the victim. See People v Yost,<sup>62</sup> where the Court concluded there was enough credible circumstantial evidence from which one could conclude that a child's death was a homicide, due to an overdose of a prescription medication called Imipramine, and that defendant killed her.

Likewise, carjacking<sup>63</sup> involves the forceful taking of a motor vehicle from another person. The essence of that crime is that a vehicle is driven away from the driver. But nuances in the “perpetration” of that crime are created by unique facts from each case. See People v Garcia,<sup>64</sup> where the driver refused to get into the truck of the car and was fatally shot, and People v Green,<sup>65</sup> where the driver remained with the car throughout the period of defendants' possession. The carjacking statute does not specify how far the offender must take or drive the vehicle in order to “perpetrate” the crime.

The *statutory* crime of arson was added as a predicate felony in 1996. However, statutory arson was not considered in People v Nowack.<sup>66</sup> In Nowack, the defendant attempted suicide by releasing natural gas into his apartment, causing a fire which killed two residents. It was difficult to prove defendant ignited the gas intentionally. However, the Court held the evidence supported a reasonable inference that the defendant ignited the gas after he released it in his apartment. His act of purposefully creating conditions that caused the building to burn had satisfied the elements of *common-law* arson. In the “perpetration” of common-law arson, defendant Nowack committed two murders. By virtue of the “degree-raising” character of the statute, MCL 750.316(1)(b), those murders were elevated to First-Degree Murder.<sup>67</sup>

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<sup>62</sup> 468 Mich 122; 659 NW2d 604 (2003).

<sup>63</sup> MCL 750.529a.

<sup>64</sup> 448 Mich 442; 531 NW2d 683 (1995)

<sup>65</sup> 228 Mich App 684; 580 NW2d 444 (1998).

<sup>66</sup> 462 Mich 392, 400-401; 614 NW2d 78 (2000).

<sup>67</sup> To establish malice, the Court in Nowack required the prosecutor to prove the defendant intended to do the physical act which resulted in the starting of the fire or that he “intentionally



In 2004, the Legislature added Vulnerable Adult Abuse in the First and Second-Degree<sup>68</sup> to the list of predicate felonies that support a felony-murder conviction under the First-Degree Murder statute. Legislative history about that amendment to MCL 750.316(1)(b) explains the motivations for adding these predicate felonies to the list:

Though it was hoped that the legislation [MCL 750.145n] would deter abuse against individuals such as the elderly or developmentally disabled, according to media reports and members of the law enforcement community, abuse of the elderly and vulnerable is increasing. In particular, testimony presented before the House Criminal Justice Committee detailed how an Alpena County woman starved her elderly mother to death by withholding food. Death by starvation can be a painful and slow process. According to the county prosecutor, because vulnerable adult abuse is not included in the listed offenses constituting felony murder, a charge of open murder had to be brought against the daughter.<sup>69</sup>

By providing that a murder committed in the perpetration or attempted perpetration of Adult Abuse is First-Degree Murder, the Legislature created a strong “disincentive” to those felons who commit such felonies. The disincentive was designed to deter and punish those abusers.<sup>70</sup>

In 1977, the Court in People v Till<sup>71</sup> explained the differences between the common-law felony murder doctrine and statutory First-Degree Felony Murder. At the time, great confusion existed about the felony murder doctrine in Michigan.<sup>72</sup> In discussing the Felony Murder statute, the Court acknowledged that the Legislature had different considerations when drafting it:

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committed an act that created a very high risk of burning a dwelling house, and that, while committing the act, the defendant knew of the risk and disregarded it.” Either method of showing malice was sufficient. Wanton and wilful disregard of the likelihood that the natural tendency of a person's behavior will cause death or great bodily harm satisfies the malice requirement.

<sup>68</sup> MCL 750.145n

<sup>69</sup> House Bill 5104 (Substitute H-1), First Analysis (11-5-03)

<sup>70</sup> In 1969, the Legislature amended the First-Degree Murder statute to include Kidnapping as a predicate felony for Felony-Murder. The Legislature’s objective in enacting that amendment is explained in People v Wesley, 421 Mich 375, 404 n18, 414; 365 NW2d 692 (1984), Justice Levin’s dissent.

<sup>71</sup> 80 Mich App 16, 36 n 12; 263 NW2d 586 (1977).

<sup>72</sup> Id. at 37.

The legislative policy underlying the felony-murder rule persists: to discourage those who would commit, or attempt to commit, felonies inherently dangerous to human life by imposing a greater penalty than would otherwise obtain for deaths attributable to their acts in furtherance of the felonious purpose.

The felony-murder statute had just been amended to include larceny of any kind, extortion or kidnapping among the enumerated felonies. The amendment was considered “an unwarranted extension of felony-murder to non-violent crimes,” according to legal commentaries. Wise, Criminal Law and Procedure, 17 Wayne L Rev 381, 400 (1971). Yet the Court in Till considered the types of crimes to be included within the enumerated felonies as an exclusively “legislative determination.”<sup>73</sup>

In the end, the fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature.<sup>74</sup> If statutory language is clear and unambiguous, the Legislature must have intended the meaning it expressed, and the statute must be enforced as written.<sup>75</sup> As a result, the First-Degree Murder statute allows a conviction based on a First-Degree Home Invasion crime, where two deaths occurred several miles from the home and a few minutes after defendant left the dwelling. These vehicular deaths were the result of acts committed “*in the perpetration of, or attempt to perpetrate*” of First-Degree Home Invasion. Based on the plain language of the statute, the Court of Appeals decision should be reversed, and Defendant’s two First-Degree Felony Murder convictions should be reinstated.

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<sup>73</sup> Id.

<sup>74</sup> Nation v W D E Electric Co, 454 Mich 489, 494; 563 NW2d 233 (1997).

<sup>75</sup> Tryc v Michigan Veterans' Facility, 451 Mich 129, 135; 545 NW2d 642 (1996).

## II

**THE EXECUTIVE BRANCH OF THE GOVERNMENT FILES CRIMINAL CHARGES AGAINST DEFENDANTS, AND THE JUDICIAL BRANCH REVIEWS THESE CHARGING DECISIONS TO DETERMINE IF THEY ARE UNCONSTITUTIONAL, ILLEGAL OR ULTRA VIRES. IN DEFENDANT'S FIRST-DEGREE MURDER CASE, THE COURT OF APPEALS FOUND HIS FIRST DEGREE HOME INVASION CRIME WAS UNCONNECTED TO TWO VEHICULAR DEATHS. THIS FACT-FINDING WAS NOT BASED ON THE EXECUTIVE BRANCH'S UNCONSTITUTIONAL, ILLEGAL OR ULTRA VIRES ACTIONS. CONSEQUENTLY, THE COURT'S DECISION SHOULD BE REVERSED BECAUSE IT VIOLATED THE SEPARATION OF POWERS CLAUSE OF MICHIGAN'S CONSTITUTION.**

The Court of Appeals reversed Defendant's two First-Degree Felony Murder convictions, after finding the Ackermans' deaths were "not a part of the continuous transaction of or immediately connected to the home invasion." [Slip Opinion, p 3] The Court determined Defendant should have been charged with Fleeing and Eluding and Second-Degree Murder instead. But these findings of fact and legal conclusions violated the constitutional doctrine of separation of powers. This Court must reverse the Court of Appeals' decision, and affirm Defendant's First-Degree Felony Murder convictions.

### **STANDARD OF REVIEW**

It is a violation of the separation of powers doctrine for a court to second-guess whether a prosecutor had a "rational basis" or "good reason" for bringing charges under one statute rather than another applicable statute. Discretion is afforded a prosecutor by the fact that evidence is available to support a charge under either statute. That discretion is abused only if a choice is made for reasons that are "unconstitutional, illegal, or ultra vires." Courts thus review a charging decision under an **"abuse of power" standard**, questioning whether a prosecutor acted in

contravention of the constitution or the law.<sup>76</sup>

## **SEPARATION OF POWERS CLAUSE OF THE MICHIGAN CONSTITUTION**

The separation of powers doctrine is set out in Michigan's Constitution:

The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.<sup>77</sup>

The prosecutor is a constitutional officer<sup>78</sup> who exercises executive power when deciding whether to initiate criminal charges and what charges to bring.<sup>79</sup> The separation of powers provision of Michigan's Constitution, therefore, restricts *judicial* interference with the prosecutor's exercise of executive powers.<sup>80</sup> The discretion over what charges to file "will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification."<sup>81</sup>

The Court of Appeals is subject to the separation of powers doctrine. In People v Venticinque,<sup>82</sup> this Court reversed the Court of Appeals' decision remanding the case for trial on a misdemeanor charge. The prosecutor had charged the defendant with the felony of misrepresenting the identity of a motor vehicle, and presented a prima facie case at the preliminary examination. This Court found the Court of Appeals abused its discretion in reducing the charges. The Venticinque case was remanded for entry of an order of bindover on

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<sup>76</sup> People v Barksdale, 219 Mich App 484, 487-488; 556 NW2d 521 (1996), citing Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 683-684; 194 NW2d 693 (1972) and People v Siebert, 450 Mich 500, 510; 537 NW2d 891 (1995).

<sup>77</sup> Const 1963, art 3, § 2.

<sup>78</sup> Const 1963, art 7, § 4.

<sup>79</sup> People v Venticinque, 459 Mich 90, 100; 586 NW2d 732 (1998).

<sup>80</sup> People v Conat, 238 Mich App 134, 149-151; 605 NW2d 49 (1999) and People v Grove, 455 Mich 439, 460 n 27; 566 NW2d 547 (1997).

<sup>81</sup> People v Oxendine, 201 Mich App 372, 377; 506 NW2d 885 (1993)

<sup>82</sup> 459 Mich 90.

the felony.

### **FIRST-DEGREE FELONY MURDER CHARGES**

In the instant case, the prosecution proved Defendant committed First Degree Home Invasion and, in perpetration of that felony, two people were killed as a result of his malevolent, high-speed escape efforts. First-Degree Home Invasion is a specified felony under the First-Degree Murder statute. It was the predicate felony for the Felony Murder charges lodged against Defendant. These charges were not unconstitutional, illegal, or ultra vires. The Court of Appeals did not address those issues, or summarily find otherwise.

Sufficient evidence of malice existed in the record to convict Defendant of Second-Degree Murder. The Court of Appeals found that. Malice “may be inferred when a defendant uses an automobile in a reckless fashion to evade the police.” [Slip Opinion, p 4] Circumstantial evidence and reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of an offense, including malice.<sup>83</sup> Defendant’s intentional, wrong-way-on-the-expressway conduct was very risky and he knew it to be so. That was obviously why he drove on the shoulder.

Viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented that Defendant acted in wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. That is Second-Degree Murder.<sup>84</sup> Evidence adduced at the trial established that two deaths occurred, that the deaths were caused by acts of Defendant, and that he possessed the requisite mental state with respect to the actus reus of the crime.

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<sup>83</sup> People v Goecke, 457 Mich 442, 464; 579 NW2d 868 (1998), People v Vasquez, 129 Mich App 691; 341 NW2d 873 (1983).

<sup>84</sup> People v Goecke, 457 Mich at 466.

By enacting the “degree-elevating” First-Degree Murder statute, the Legislature certainly permitted the prosecution to charge Defendant and prove that the murders were *committed in the perpetration* of First-Degree Home Invasion. The prosecution had the discretion to bring charges it deemed appropriate.

If there are policy concerns about certain statutes, those concerns are proper considerations for the Legislature, not the courts.<sup>85</sup> If the Legislature enacted a constitutionally-valid statutory scheme within its legislative authority, the Court has agreed it should not overrule that scheme simply because the Court does not like it. "The mere fact a statute appears impolitic or unwise is not sufficient for judicial construction but is a matter for the legislature."<sup>86</sup>

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<sup>85</sup> People v Johnson, 427 Mich 98, 114; 398 NW2d 219 (1986).

<sup>86</sup> Id., quoting from Lansing v Lansing Twp, 356 Mich 641, 648; 97 NW2d 804 (1959).


**RELIEF**

BASED ON THE REASONS STATED, the Prosecuting Attorneys Association of Michigan, Amicus Curiae in support of Plaintiff-Appellant People of the State of Michigan, respectfully requests this Honorable Court reverse the Court of Appeals in the instant case, and reinstate Defendant-Appellee's First-Degree Murder convictions.

Respectfully submitted,

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